105TH CONGRESS
2D SESSION

H. R. 872

AN ACT

To establish rules governing product liability actions against raw materials and bulk component suppliers to medical device manufacturers, and for other purposes.

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To establish rules governing product liability actions against raw materials and bulk component suppliers to medical device manufacturers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the ''Biomaterials Access Assurance Act of 1998''.

SEC. 2. FINDINGS.

The Congress finds that—

(1) each year millions of citizens of the United States depend on the availability of lifesaving or life-enhancing medical devices, many of which are permanently implantable within the human body;

(2) a continued supply of raw materials and component parts is necessary for the invention, development, improvement, and maintenance of the supply of the devices;

(3) most of the medical devices are made with raw materials and component parts that—

(A) move in interstate commerce;

(B) are not designed or manufactured specifically for use in medical devices; and

(C) come in contact with internal human tissue;

(4) the raw materials and component parts also are used in a variety of nonmedical products;

(5) because small quantities of the raw materials and component parts are used for medical devices, sales of raw materials and component parts for medical devices constitute an extremely small

portion of the overall market for the raw materials and component parts;

(6) under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) manufacturers of medical devices are required to demonstrate that the medical devices are safe and effective, including demonstrating that the products are properly designed and have adequate warnings or instructions;

(7) notwithstanding the fact that raw materials and component parts suppliers do not design, produce, or test a final medical device, the suppliers have been the subject of actions alleging inadequate—

(A) design and testing of medical devices manufactured with materials or parts supplied by the suppliers; or

(B) warnings related to the use of such medical devices;

(8) even though suppliers of raw materials and component parts have very rarely been held liable in such actions, such suppliers have ceased supplying certain raw materials and component parts for use in medical devices for a number of reasons, including concerns about the costs of such litigation;

(9) unless alternate sources of supply can be found, the unavailability of raw materials and component parts for medical devices will lead to unavailability of lifesaving and life-enhancing medical devices;

(10) because other suppliers of the raw materials and component parts in foreign nations are refusing to sell raw materials or component parts for use in manufacturing certain medical devices in the United States, the prospects for development of new sources of supply for the full range of threatened raw materials and component parts for medical devices are remote;

(11) it is unlikely that the small market for such raw materials and component parts in the United States could support the large investment needed to develop new suppliers of such raw materials and component parts;

(12) attempts to develop such new suppliers would raise the cost of medical devices;

(13) courts that have considered the duties of the suppliers of the raw materials and component parts have generally found that the suppliers do not have a duty—

(A) to evaluate the safety and efficacy of the use of a raw material or component part in a medical device; or

(B) to warn consumers concerning the safety and effectiveness of a medical device;

(14) because medical devices and the raw materials and component parts used in their manufacture move in interstate commerce, a shortage of such raw materials and component parts affects interstate commerce;

(15) in order to safeguard the availability of a wide variety of lifesaving and life-enhancing medical devices, immediate action is needed—

(A) to clarify the permissible bases of liability for suppliers of raw materials and component parts for medical devices; and

(B) to provide expeditious procedures to dispose of unwarranted suits against the suppliers in such manner as to minimize litigation costs;

(16) the several States and their courts are the primary architects and regulators of our tort system; Congress, however, must, in certain circumstances involving the national interest, address tort issues, and a threatened shortage of raw materials and

component parts for life-saving medical devices is one such circumstance; and

(17) the protections set forth in this Act are needed to assure the continued supply of materials for life-saving medical devices, although such protections do not protect negligent suppliers.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) BIOMATERIALS SUPPLIER.—

(A) IN GENERAL.—The term ''biomaterials supplier'' means an entity that directly or indirectly supplies a component part or raw material for use in the manufacture of an implant.

(B) PERSONS INCLUDED.—Such term includes any person who—

(i) has submitted master files to the Secretary for purposes of premarket approval of a medical device; or

(ii) licenses a biomaterials supplier to produce component parts or raw materials.

(2) CLAIMANT.—

(A) IN GENERAL.—The term ''claimant'' means any person who brings a civil action, or on whose behalf a civil action is brought, arising from harm allegedly caused directly or indi-

rectly by an implant, including a person other than the individual into whose body, or in contact with whose blood or tissue, the implant is placed, who claims to have suffered harm as a result of the implant.

(B) ACTION BROUGHT ON BEHALF OF AN ESTATE.—With respect to an action brought on behalf of or through the estate of a deceased individual into whose body, or in contact with whose blood or tissue the implant was placed, such term includes the decedent that is the subject of the action.

(C) ACTION BROUGHT ON BEHALF OF A MINOR OR INCOMPETENT.—With respect to an action brought on behalf of or through a minor or incompetent, such term includes the parent or guardian of the minor or incompetent.

(D) EXCLUSIONS.—Such term does not include—

(i) a provider of professional health care services in any case in which—

(I) the sale or use of an implant is incidental to such services; and

(II) the essence of the professional health care services provided is

the furnishing of judgment, skill, or services;

(ii) a person acting in the capacity of a manufacturer, seller, or biomaterials supplier; or

(iii) a person alleging harm caused by either the silicone gel or the silicone envelope utilized in a breast implant containing silicone gel, except that—

(I) neither the exclusion provided by this clause nor any other provision of this Act may be construed as a finding that silicone gel (or any other form of silicone) may or may not cause harm; and

(II) the existence of the exclusion under this clause may not—

(aa) be disclosed to a jury in any civil action or other proceeding; and

(bb) except as necessary to establish the applicability of this Act, otherwise be presented in any civil action or other proceeding.

(3) COMPONENT PART.—

(A) IN GENERAL.—The term ''component part'' means a manufactured piece of an implant.

(B) CERTAIN COMPONENTS.—Such term includes a manufactured piece of an implant that—

(i) has significant non-implant applications; and

(ii) alone, has no implant value or purpose, but when combined with other component parts and materials, constitutes an implant.

(4) HARM.—

(A) IN GENERAL.—The term ''harm'' means—

(i) any injury to or damage suffered by an individual;

(ii) any illness, disease, or death of that individual resulting from that injury or damage; and

(iii) any loss to that individual or any other individual resulting from that injury or damage.

(B) EXCLUSION.—The term does not include any commercial loss or loss of or damage to an implant.

(5) IMPLANT.—The term ''implant'' means—

(A) a medical device that is intended by the manufacturer of the device—

(i) to be placed into a surgically or naturally formed or existing cavity of the body for a period of at least 30 days; or

(ii) to remain in contact with bodily fluids or internal human tissue through a surgically produced opening for a period of less than 30 days; and

(B) suture materials used in implant procedures.

(6) MANUFACTURER.—The term ''manufacturer'' means any person who, with respect to an implant—

(A) is engaged in the manufacture, preparation, propagation, compounding, or processing (as defined in section 510(a)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360(a)(1)) of the implant; and

(B) is required—

(i) to register with the Secretary pursuant to section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360) and the regulations issued under such section; and

(ii) to include the implant on a list of devices filed with the Secretary pursuant to section 510(j) of such Act (21 U.S.C. 360(j)) and the regulations issued under such section.

(7) MEDICAL DEVICE.—The term ''medical device'' means a device, as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h)), and includes any device component of any combination product as that term is used in section 503(g) of such Act (21 U.S.C. 353(g)).

(8) RAW MATERIAL.—The term ''raw material'' means a substance or product that—

(A) has a generic use; and

(B) may be used in an application other than an implant.

(9) SECRETARY.—The term ''Secretary'' means the Secretary of Health and Human Services.

(10) SELLER.—

(A) IN GENERAL.—The term ''seller'' means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, packages, labels, or otherwise places an implant in the stream of commerce.

(B) EXCLUSIONS.—The term does not include—

(i) a seller or lessor of real property;

(ii) a provider of professional health care services in any case in which—

(I) the sale or use of the implant is incidental to such services; and

(II) the essence of the professional health care services provided is the furnishing of judgment, skill, or services; or

(iii) any person who acts in only a financial capacity with respect to the sale of an implant.

SEC. 4. GENERAL REQUIREMENTS; APPLICABILITY; PREEMPTION.

(a) GENERAL REQUIREMENTS.—

(1) IN GENERAL.—In any civil action covered by this Act, a biomaterials supplier may—

(A) raise any exclusion from liability set forth in section 5; and

(B) make a motion for dismissal or for summary judgment as set forth in section 6.

(2) PROCEDURES.—Notwithstanding any other provision of law, a Federal or State court in which an action covered by this Act is pending shall, in connection with a motion under section 6 or 7, use the procedures set forth in this Act.

(b) APPLICABILITY.—

(1) IN GENERAL.—Except as provided in paragraph (2), this Act applies to any civil action brought by a claimant, whether in a Federal or State court, on the basis of any legal theory, for harm allegedly caused, directly or indirectly, by an implant.

(2) EXCLUSION.—A civil action brought by a purchaser of a medical device, purchased for use in providing professional health care services, for loss or damage to an implant or for commercial loss to the purchaser—

(A) shall not be considered an action that is subject to this Act; and

(B) shall be governed by applicable commercial or contract law.

(c) SCOPE OF PREEMPTION.—

(1) IN GENERAL.—This Act supersedes any State law regarding recovery for harm caused by an implant and any rule of procedure applicable to a civil action to recover damages for such harm only to the extent that this Act establishes a rule of law applicable to the recovery of such damages.

(2) APPLICABILITY OF OTHER LAWS.—Any issue that arises under this Act and that is not governed by a rule of law applicable to the recovery of damages described in paragraph (1) shall be governed by applicable Federal or State law.

(d) STATUTORY CONSTRUCTION.—Nothing in this Act may be construed—

(1) to affect any defense available to a defendant under any other provisions of Federal or State law in an action alleging harm caused by an implant; or

(2) to create a cause of action or Federal court jurisdiction pursuant to section 1331 or 1337 of title 28, United States Code, that otherwise would not exist under applicable Federal or State law.

SEC. 5. LIABILITY OF BIOMATERIALS SUPPLIERS.

(a) IN GENERAL.—Except as provided in section 7, a biomaterials supplier shall not be liable for harm to a

claimant caused by an implant unless such supplier is liable—

(1) as a manufacturer of the implant, as provided in subsection (b);

(2) as a seller of the implant, as provided in subsection (c); or

(3) for furnishing raw materials or component parts for the implant that failed to meet applicable contractual requirements or specifications, as provided in subsection (d).

(b) LIABILITY AS MANUFACTURER.—

(1) IN GENERAL.—A biomaterials supplier may, to the extent required and permitted by any other applicable law, be liable for harm to a claimant caused by an implant if the biomaterials supplier is the manufacturer of the implant.

(2) GROUNDS FOR LIABILITY.—The biomaterials supplier may be considered the manufacturer of the implant that allegedly caused harm to a claimant only if the biomaterials supplier—

(A)(i) registered or was required to register with the Secretary pursuant to section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360) and the regulations issued under such section; and

(ii) included or was required to include the implant on a list of devices filed with the Secretary pursuant to section 510(j) of such Act (21 U.S.C. 360(j)) and the regulations issued under such section;

(B) is the subject of a declaration issued by the Secretary pursuant to paragraph (3) that states that the supplier, with respect to the implant that allegedly caused harm to the claimant, was required to—

(i) register with the Secretary under section 510 of such Act (21 U.S.C. 360), and the regulations issued under such section, but failed to do so; or

(ii) include the implant on a list of devices filed with the Secretary pursuant to section 510(j) of such Act (21 U.S.C. 360(j)) and the regulations issued under such section, but failed to do so; or

(C) is related by common ownership or control to a person meeting all the requirements described in subparagraph (A) or (B), if the court deciding a motion to dismiss in accordance with section 6(c)(3)(B)(i) finds, on the basis of affidavits submitted in accordance with

section 6, that it is necessary to impose liability on the biomaterials supplier as a manufacturer because the related manufacturer meeting the requirements of subparagraph (A) or (B) lacks sufficient financial resources to satisfy any judgment that the court feels it is likely to enter should the claimant prevail.

(3) ADMINISTRATIVE PROCEDURES.—

(A) IN GENERAL.—The Secretary may issue a declaration described in paragraph (2)(B) on the motion of the Secretary or on petition by any person, after providing—

(i) notice to the affected persons; and

(ii) an opportunity for an informal hearing.

(B) DOCKETING AND FINAL DECISION.—Immediately upon receipt of a petition filed pursuant to this paragraph, the Secretary shall docket the petition. Not later than 120 days after the petition is filed, the Secretary shall issue a final decision on the petition.

(C) APPLICABILITY OF STATUTE OF LIMITATIONS.—Any applicable statute of limitations shall toll during the period from the time a claimant files a petition with the Secretary

under this paragraph until such time as either (i) the Secretary issues a final decision on the petition, or (ii) the petition is withdrawn.

(D) STAY PENDING PETITION FOR DECLARATION.—If a claimant has filed a petition for a declaration with respect to a defendant, and the Secretary has not issued a final decision on the petition, the court shall stay all proceedings with respect to that defendant until such time as the Secretary has issued a final decision on the petition.

(c) LIABILITY AS SELLER.—A biomaterials supplier may, to the extent required and permitted by any other applicable law, be liable as a seller for harm to a claimant caused by an implant only if—

(1) the biomaterials supplier—

(A) held title to the implant and then acted as a seller of the implant after its initial sale by the manufacturer; or

(B) acted under contract as a seller to arrange for the transfer of the implant directly to the claimant after the initial sale by the manufacturer of the implant; or

(2) the biomaterials supplier is related by common ownership or control to a person meeting all the

requirements described in paragraph (1), if a court deciding a motion to dismiss in accordance with section 6(c)(3)(B)(ii) finds, on the basis of affidavits submitted in accordance with section 6, that it is necessary to impose liability on the biomaterials supplier as a seller because the related seller meeting the requirements of paragraph (1) lacks sufficient financial resources to satisfy any judgment that the court feels it is likely to enter should the claimant prevail.

(d) LIABILITY FOR FAILURE TO MEET APPLICABLE CONTRACTUAL REQUIREMENTS OR SPECIFICATIONS.—A biomaterials supplier may, to the extent required and permitted by any other applicable law, be liable for harm to a claimant caused by an implant if the claimant in an action shows, by a preponderance of the evidence, that—

(1) the biomaterials supplier supplied raw materials or component parts for use in the implant that either—

(A) did not constitute the product described in the contract between the biomaterials supplier and the person who contracted for the supplying of the product; or

(B) failed to meet any specifications that were—

(i) accepted, pursuant to applicable law, by the biomaterials supplier;

(ii) published by the biomaterials supplier;

(iii) provided by the biomaterials supplier to the person who contracted for such product;

(iv) contained in a master file that was submitted by the biomaterials supplier to the Secretary and that is currently maintained by the biomaterials supplier for purposes of premarket approval of medical devices; or

(v) included in the submissions for purposes of premarket approval or review by the Secretary under section 510, 513, 515, or 520 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360, 360c, 360e, or 360j), and received clearance from the Secretary if such specifications were accepted, pursuant to applicable law, by the biomaterials supplier; and

(2) such failure to meet applicable contractual requirements or specifications was an actual and proximate cause of the harm to the claimant.

SEC. 6. PROCEDURES FOR DISMISSAL OF CIVIL ACTIONS AGAINST BIOMATERIALS SUPPLIERS.

(a) MOTION TO DISMISS.—A defendant may, at any time during which a motion to dismiss may be filed under applicable law, move to dismiss an action against it on the grounds that the defendant is a biomaterials supplier and one or more of the following:

(1) The defendant is not liable as a manufacturer, as provided in section 5(b).

(2) The defendant is not liable as a seller, as provided in section 5(c).

(3) The defendant is not liable for furnishing raw materials or component parts for the implant that failed to meet applicable contractual requirements or specifications, as provided in section 5(d).

(4) The claimant did not name the manufacturer as a party to the action, as provided in subsection (b).

(b) MANUFACTURER OF IMPLANT SHALL BE NAMED A PARTY.—In any civil action covered by this Act, the claimant shall be required to name the manufacturer of the implant as a party to the action, unless—

(1) the manufacturer is subject to service of process solely in a jurisdiction in which the biomaterials supplier is not domiciled or subject to a service of process; or

(2) a claim against the manufacturer is barred by applicable law or rule of practice.

(c) PROCEEDING ON MOTION TO DISMISS.—The following rules shall apply to any proceeding on a motion to dismiss filed by a defendant under this section:

(1) EFFECT OF MOTION TO DISMISS ON DISCOVERY.—

(A) IN GENERAL.—Except as provided in subparagraph (B), if a defendant files a motion to dismiss under subsection (a), no discovery shall be permitted in connection with the action that is the subject of the motion, other than discovery necessary to determine a motion to dismiss for lack of jurisdiction, until such time as the court rules on the motion to dismiss.

(B) DISCOVERY.—If a defendant files a motion to dismiss under subsection (a)(3) on the grounds that it did not furnish raw materials or component parts for the implant that failed to meet applicable contractual requirements or specifications, the court may permit discovery limited to issues that are directly relevant to—

(i) the pending motion to dismiss; or

(ii) the jurisdiction of the court.

(2) AFFIDAVITS.—

(A) DEFENDANT.—A defendant may submit affidavits supporting the grounds for dismissal contained in its motion to dismiss under subsection (a). If the motion is made under subsection (a)(1), the defendant may submit an affidavit demonstrating that the defendant has not included the implant on a list, if any, filed with the Secretary pursuant to section 510(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360(j)).

(B) CLAIMANT.—In response to a motion to dismiss, the claimant may submit affidavits demonstrating that—

(i) the Secretary has, with respect to the defendant and the implant that allegedly caused harm to the claimant, issued a declaration pursuant to section 5(b)(2)(B); or

(ii) the defendant is a seller of the implant who is liable under section 5(c).

(3) BASIS OF RULING ON MOTION TO DISMISS.—The court shall rule on a motion to dismiss filed under subsection (a) solely on the basis of the pleadings and affidavits of the parties made pursu-

ant to this subsection. The court shall grant a motion to dismiss filed under subsection (a)—

(A) unless the claimant submits a valid affidavit that demonstrates that the defendant is not a biomaterials supplier;

(B) unless the court determines, to the extent raised in the pleadings and affidavits, that one or more of the following apply:

(i) the defendant may be liable as a manufacturer, as provided in section 5(b);

(ii) the defendant may be liable as a seller, as provided in section 5(c); or

(iii) the defendant may be liable for furnishing raw materials or component parts for the implant that failed to meet applicable contractual requirements or specifications, as provided in section 5(d); or

(C) if the claimant did not name the manufacturer as a party to the action, as provided in subsection (b).

(4) TREATMENT OF MOTION AS MOTION FOR SUMMARY JUDGMENT.—The court may treat a motion to dismiss as a motion for summary judgment subject to subsection (d) in order to determine

whether the pleadings and affidavits, in connection with such action, raise genuine issues of material fact concerning whether the defendant furnished raw materials or component parts of the implant that failed to meet applicable contractual requirements or specifications as provided in section 5(d).

(d) SUMMARY JUDGMENT.—

(1) IN GENERAL.—

(A) BASIS FOR ENTRY OF JUDGMENT.—If a motion to dismiss of a biomaterials supplier is to be treated as a motion for summary judgment under subsection (c)(4) or if a biomaterials supplier moves for summary judgment, the biomaterials supplier shall be entitled to entry of judgment without trial if the court finds there is no genuine issue of material fact for each applicable element set forth in paragraphs (1) and (2) of section 5(d).

(B) ISSUES OF MATERIAL FACT.—With respect to a finding made under subparagraph (A), the court shall consider a genuine issue of material fact to exist only if the evidence submitted by the claimant would be sufficient to allow a reasonable jury to reach a verdict for

the claimant if the jury found the evidence to be credible.

(2) DISCOVERY MADE PRIOR TO A RULING ON A MOTION FOR SUMMARY JUDGMENT.—If, under applicable rules, the court permits discovery prior to a ruling on a motion for summary judgment governed by section 5(d), such discovery shall be limited solely to establishing whether a genuine issue of material fact exists as to the applicable elements set forth in paragraphs (1) and (2) of section 5(d).

(3) DISCOVERY WITH RESPECT TO A BIOMATERIALS SUPPLIER.—A biomaterials supplier shall be subject to discovery in connection with a motion seeking dismissal or summary judgment on the basis of the inapplicability of section 5(d) or the failure to establish the applicable elements of section 5(d) solely to the extent permitted by the applicable Federal or State rules for discovery against nonparties.

(e) DISMISSAL WITH PREJUDICE.—An order granting a motion to dismiss or for summary judgment pursuant to this section shall be entered with prejudice, except insofar as the moving defendant may be rejoined to the action as provided in section 7.

(f) MANUFACTURER CONDUCT OF LITIGATION.—The manufacturer of an implant that is the subject of an ac-

tion covered under this Act shall be permitted to conduct litigation on any motion for summary judgment or dismissal filed by a biomaterials supplier who is a defendant under this section on behalf of such supplier if the manufacturer and any other defendant in such action enter into a valid and applicable contractual agreement under which the manufacturer agrees to bear the cost of such litigation or to conduct such litigation.

SEC. 7. SUBSEQUENT IMPLEADER OF DISMISSED BIOMATERIALS SUPPLIER.

(a) IMPLEADING OF DISMISSED DEFENDANT.—A court, upon motion by a manufacturer or a claimant within 90 days after entry of a final judgment in an action by the claimant against a manufacturer, and notwithstanding any otherwise applicable statute of limitations, may implead a biomaterials supplier who has been dismissed from the action pursuant to this Act if—

(1) the manufacturer has made an assertion, either in a motion or other pleading filed with the court or in an opening or closing statement at trial, or as part of a claim for contribution or indemnification, and the court finds based on the court's independent review of the evidence contained in the record of the action, that under applicable law—

(A) the negligence or intentionally tortious conduct of the dismissed supplier was an actual and proximate cause of the harm to the claimant; and

(B) the manufacturer's liability for damages should be reduced in whole or in part because of such negligence or intentionally tortious conduct; or

(2) the claimant has moved to implead the supplier and the court finds, based on the court's independent review of the evidence contained in the record of the action, that under applicable law—

(A) the negligence or intentionally tortious conduct of the dismissed supplier was an actual and proximate cause of the harm to the claimant; and

(B) the claimant is unlikely to be able to recover the full amount of its damages from the remaining defendants.

(b) STANDARD OF LIABILITY.—Notwithstanding any preliminary finding under subsection (a), a biomaterials supplier who has been impleaded into an action covered by this Act, as provided for in this section—

(1) may, prior to entry of judgment on the claim against it, supplement the record of the pro-

ceeding that was developed prior to the grant of the motion for impleader under subsection (a); and

(2) may be found liable to a manufacturer or a claimant only to the extent required and permitted by any applicable State or Federal law other than this Act.

(c) DISCOVERY.—Nothing in this section shall give a claimant or any other party the right to obtain discovery from a biomaterials supplier at any time prior to grant of a motion for impleader beyond that allowed under section 6.

SEC. 8. EFFECTIVE DATE.

This Act shall apply to all civil actions covered under this Act that are commenced on or after the date of enactment of this Act, including any such action with respect to which the harm asserted in the action or the conduct that caused the harm occurred before the date of enactment of this Act.

Passed the House of Representatives July 30 (legislative day, July 29), 1998.

Attest:

Clerk.